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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 629

ALGER HISS,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March, 1953

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Petitioner, Alger Hiss, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 30, 1953, affirming an order entered by the United States District Court for the Southern District of New York on July 22, 1952, which order denied a motion by petitioner for a new trial on the ground of newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure.

Opinions Below

The opinion of the District Court (R. 286a-303a) is reported at 107 F. Supp. 128. The Court of Appeals affirmed the order of the District Court per curiam on the opinion below (R. 304).

Jurisdiction

The judgment of the Court of Appeals was entered on January 30, 1953 (R. 305). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1), and Rules 37(b) and 45(a) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Whether the District Court's treatment of the evidence tendered by affidavit demonstrated such predetermination as to constitute an abuse of discretion calling for reversal on appeal; and

2. Whether the District Court, in disposing of the motion without granting petitioner's request for a hearing at which oral evidence in support of the motion might be introduced and the Government's witnesses in opposition subjected to cross-examination, deprived petitioner of a right to which he is entitled under federal criminal law.

Rule Involved

Rule 33, Federal Rules of Criminal Procedure, reads in pertinent part as follows:

> "The court may grant a new trial to a defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment * * *."

Statement

Petitioner was convicted [1] in the United States District Court for the Southern District of New York on an indictment in two counts alleging violation of the perjury statute, 18 U. S. C., Section 1621, and on January 25, 1950, he was sentenced to five years' imprisonment on each count, the sentences to run concurrently. The judgment of conviction was affirmed by the United States Court of Appeals (185 F. 2d 822), and a petition to this Court for a writ of certiorari was denied (340 U. S. 948). Petitioner began service of his sentence on March 22, 1951, and is now confined in the United States Penitentiary at Lewisburg, Pennsylvania.

On January 24, 1952, within the two years limited by Rule 33 of the Federal Rules of Criminal Procedure for the making of motions for new trials based on the ground of newly discovered evidence, petitioner made such a motion in the United States District Court for the Southern District of New York (R. 4a). The motion was heard by Judge Henry W. Goddard, the judge who had presided at the trial resulting in the conviction, and was denied (R. 303a) on affidavits and memoranda submitted on both sides and after argument of counsel (R. 245a-285a) held on June 4, 1952, but without any hearing of the witnesses proffered by petitioner in support of the motion or of the witnesses proffered by the Government in opposition. Under General Rule 10 of the District Court for the Southern District of New York, effective March 1, 1952, Judge Goddard's opinion, filed on July 22, 1952, constituted the order of the court, and no separate order was entered.

Appeal from Judge Goddard's order resulted in affirmance by the Court of Appeals on the opinion below, without separate opinion (R. 304). By special request of the Gov-

[1] Conviction was on a second trial, the jury having disagreed on a first.

ernment the appeal was heard by the same panel of three judges as had considered the original appeal (185 F. 2d 822).

The outlines of the original perjury case against petitioner may be briefly stated.[2] The charge of the indictment was that, in testimony before a grand jury on December 15, 1948, petitioner had lied when he said that neither he, nor his wife in his presence, had ever turned over to Whittaker Chambers or to any other unauthorized person any documents of the State Department or of any other Government organization or any copies of such documents (R. 5a-6a). The sole human witness to the falsity of the alleged perjurious statement was Whittaker Chambers, who testified that from early 1937 to April 15, 1938, he and petitioner, the latter then being in the employ of the Department of State, were jointly engaged in an espionage operation pursuant to which petitioner made a practice of delivering to Chambers State Department documents, or copies, extracts, or summaries, for photographing and transmittal to the Soviet Union. Chambers's testimony alone being insufficient to support a perjury conviction (see *Weiler* v. *United States*, 323 U. S. 606), the Government undertook to corroborate his testimony by offering in evidence a set of four handwritten and forty-three typed documents (known as the Baltimore Documents) which Chambers identified as having been given to him by petitioner in the course of their alleged joint espionage operation. These documents were shown to be copies, extracts, or summaries of original State Department documents bearing dates from January 5 to April 1, 1938. In addition, the Government introduced two developed microfilm strips containing photographs of other State Department documents, the originals of which Chambers claimed had been given to him by pe-

[2] The motion, the appeal, and this petition, deal only with Count I of the indictment, it being in effect conceded by the Government and by the courts below that if evidence warranting a new trial under Count I were produced the conviction under Count II could not stand.

titioner for microfilming. These exhibits—the Baltimore Documents and the microfilm strips—Chambers claimed to have put in an envelope which he gave for safe-keeping to his wife's nephew in 1938 and which the latter had kept hidden over a disused dumbwaiter until November 14, 1948, when Chambers recalled its existence and found in it its long-forgotten contents.[3]

As to the four handwritten documents (which were brief memoranda concededly in petitioner's handwriting) and the microfilmed documents, there was no showing beyond Chambers's own testimony that they had been given to him by petitioner. To provide the necessary corroboration for Chambers's story the Government introduced expert testimony that all but one of the forty-three typed documents had been typed on the same machine as had been used to type certain other documents concededly typed by Mrs. Hiss (or by her sister) on the Woodstock typewriter owned by the Hisses in the 1930's.

In addition, there was introduced in evidence at the trial a Woodstock typewriter—serial #N230,099—which appeared to be the machine owned by the Hisses in the 1930's and given away by them to the family of their colored maid in late 1937 or early 1938. This, though found after extensive search and put in evidence by the defense, was adopted by the Government as affirmative corroboration—Government witnesses as well as witnesses for the defense identified it from superficial characteristics as being the original Hiss machine; an FBI man typed on it in front of the jury to show that it worked; the prosecutor, in summation, pointed to it and said: "They [the Baltimore Documents] were typed on that machine (indicating). Our man said it was,"[4] and he invited the jury to take it to the

[3] The discovery coincided with a pre-trial deposition hearing in a libel action brought by petitioner against Chambers in September 1948.

[4] In fact, neither the Government's expert nor anyone else had so testified, but, as the quotations in the text show, the case went to the jury on the assumption that it was the Hiss machine.

jury room when they retired to consider their verdict; and the trial judge charged the jury that it was "the contention of the Government that this is the typewriter upon which Baltimore Exhibits 5 to 47 (with the exception of Exhibit 10) were typed."

There was no other corroboration at the trial.[5] Chambers's wife, Esther, testified to a social relationship between the Chamberses and the Hisses of an extent and intimacy which the latter denied; but she gave no testimony as to the nature of her husband's espionage activities, or as to petitioner's alleged participation in them. A colored maid, Edith Murray, was introduced as a Government witness in rebuttal on the last day of the second trial, to testify that while working for the Chamberses in 1935-6 she had once seen petitioner for five minutes as a visitor in the Chamberses' apartment; but she likewise contributed nothing with respect to the perjury charged in the indictment.

The newly discovered evidence offered on the motion for a new trial fell into four main categories:

1. *The Typewriter.* Though hampered by the refusal of witnesses to testify for fear of personal consequences, and by FBI possession of pertinent records, petitioner's attorneys succeeded after extensive investigation in collecting evidence which, if it could stand the test of cross-examination, would show conclusively that the typewriter in evidence—Woodstock #N230,099—could not be the Hiss family machine. This evidence showed that a genuine machine bearing that serial number would necessarily have had a different type-style, and would have been manufactured too late to be the machine originally purchased by Mrs. Hiss's father and later given to her by him. The nature of the evidence in support of these conclusions is set forth at R. 26a-37a.

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[5] As indicated in note 2, p. 4, *supra*, we are concerned here only with Count I of the indictment.

Encouraged by this historical investigation, petitioner's attorneys submitted the machine (which had between the trials and during the second trial being impounded by order of the District Court) for examination by a well-known firm of metallurgical and chemical analysts. This first-hand examination of the machine produced expert proof, offered by affidavit, and by a tender of oral testimony (see R. 259a) which the trial court declined to hear, that the machine was not one which had worn normally since leaving the factory, but showed positive signs of having been deliberately altered, in that many of its types were replacements of the originals and had been deliberately shaped (R. 126a et seq.).

Thirdly, petitioner's attorneys undertook to expose the invalidity of the assumption underlying the Government's expert testimony regarding the typing of the Baltimore Documents—an assumption universal among document examiners (see R. 57a)—to the effect that no two typewriters could ever type alike by accident, or be made to do so by design. To this end a mechanic was retained to construct, if possible, a machine which would so precisely duplicate the typing of another as to defy detection. He did so, working solely from samples of the typing from the machine he was duplicating, and as demonstration of the success of the experiment there were filed in support of the motion a set of thirty samples indiscriminately typed on the two machines, without notation as to which were typed on which (see R. 59a). The document expert under whose supervision the experiment had been conducted, and whose affidavit attested the success of the experiment, offered to supply the court with a key to the samples should it be desired to check the accuracy of the results of any test to which the Government might choose to subject the samples (R. 59a). The trial court ignored even the fact that evidence demonstrating the success of the experiment had been introduced.

2. *The Baltimore Documents.* After repeated unsuccessful efforts before, during and after the second trial to secure access to the Baltimore Documents for the purpose of physical inspection and testing,[6] petitioner's attorneys finally, on March 21, 1952, received permission from the trial judge to inspect the Documents under FBI guard, as well as the envelope in which Chambers claimed to have hidden them from 1938-1948, and to take samples of the paper from each for testing purposes (see R. 138a). As a result of this inspection and testing by petitioner's experts, evidence was offered in affidavit form, and oral testimony was tendered, to show that the typed Baltimore Documents fell into two groups which could not have been kept together under the same conditions of storage over ten years, and that both groups were totally devoid of certain stains and pressure marks which would have had to appear on documents kept in the envelope in question (R. 143a-145a, 164a-167a). Furthermore, on the basis of study of the originals (as distinct from the photographs previously available) petitioner's experts were prepared to prove that the documents bore intrinsic evidence of forgery, and in particular were not typed by Mrs. Hiss, as Chambers had testified was the case (R. 143a-145a, 150a-154a, 168a).

3. *Chambers's Possession of the Baltimore Documents.* Since the State Department documents underlying the Baltimore Documents bore dates from January 5 to April 1, 1938, Chambers must, if his story were to be believed, have remained active in his espionage conspiracy until at least some few days after the latter date. He testified that he did so remain active until April 15, 1938, and that after he broke he secured a translating job from Paul Willert of the Oxford University Press.

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[6] One corner of one sheet had finally been turned over to the defense for paper analysis, over the Government's urgent objection, when the second trial was more than half through.

After long and fruitless search petitioner's attorneys succeeded in locating Mr. Willert in Europe, where he had been for many years, and offered in support of the motion his affidavit that indeed Chambers had by his own admission already broken with the Party at the time he got the translation, but that the time was not after April 1, 1938, as Chambers claimed (and had to claim if his story was to be believed), but some weeks before that date (R. 120a-122a). To confirm Willert's recollection of the date petitioner submitted copies of papers from the files of the Oxford University Press which showed that at least some, and probably the last, part of the translation had been sent to Chambers by March 18, 1938 (R. 99a, 122a).

4. *Edith Murray.* Though she contributed nothing with respect to the perjury charged in the indictment (see p. 6, *supra*), Edith Murray's testimony was invested with artificial importance by the fact that she was the sole human being produced by the Government (outside the Chamberses themselves) to support the Chamberses' version of their acquaintance with the Hisses, and further by the Government's tactic of producing her as a witness only on the last day of the trial, when her veracity could neither be practicably investigated nor adequately tested on cross-examination.[7]

Witnesses discovered after the trial were offered in support of the motion, to testify that no colored maid had worked for the Chamberses when and where Edith Murray said she had (R. 90a-95a).

In opposition to the motion the Government submitted a number of counter-affidavits (R. 170a-244a). To some

[7] Although her existence was known to the Government well before the second trial, and she was actually in the court house at the opening of the trial, knowledge of her existence was withheld from the defense until her production as a witness on the last day.

extent these counter-affidavits created issues of fact; in other respects they left untouched the evidence proffered in support of the motion. At the argument on the motion petitioner's attorney urged upon the court the need for a hearing of the witnesses, to resolve such conflicts as had been created by the affidavits, to permit demonstration of the basis for the expert conclusions advanced in support of the motion, and to make possible the presentation of other supporting evidence not available without subpoena. Notwithstanding this request, the motion was denied solely on the basis of the affidavits and briefs and oral argument of counsel. As noted above (p. 3, *supra*), the Court of Appeals affirmed per curiam, on the opinion below.

Specification of Errors to be Urged

The Court of Appeals erred in affirming the order of the District Court, in that:

1. The District Court's order denying the motion for a new trial constituted an abuse of discretion calling for reversal on appeal; and

2. The making of the order by the District Court without first granting petitioner's request for an evidentiary hearing deprived petitioner of a right to which he was entitled under federal criminal law.

Reasons for Granting the Writ

It is elementary that the granting or denying of a motion for a new trial on the ground of newly discovered evidence lies within the judicial discretion of the trial court (*see, e.g., Prisament* v. *United States*, 96 F. 2d 865, 866 (C. A. 5th, 1938)), and that the exercise of that discretion will not be reviewed on appeal "except for most extraordinary circumstances" (*United States* v. *Johnson*, 327 U. S. 106, 111).

We respectfully submit that this case presents "most extraordinary circumstances", and that in its disposition of our appeal the court below has so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Furthermore, we believe that the court below, in affirming the trial court's refusal to grant a hearing at which oral evidence might be produced in support of the motion, and the Government's witnesses in opposition subjected to cross-examination, has decided an important question of federal law which has not been, but should be, settled by this Court.

Our appeal from the decision of the trial court was not, and this petition for a writ of certiorari is not, in the nature of a prayer that the appellate courts review the findings of the trial court as to the facts, and substitute their own judgment for that of the trial court. The grounds of our appeal to the Court of Appeals went to the heart of the question whether the trial court had given that consideration to our proffered evidence which the exercise of true judicial discretion requires. Our position below in this respect—which is also our position in this Court—will appear from the following excerpt from our brief in the Court of Appeals:

"We intend to show on this appeal:

that the trial judge misconceived the burden which the defense was required to carry in order to support the motion:

that he misstated or misunderstood much of the evidence offered in support of the motion:

that he passed over or neglected to consider vital elements of proof offered:

that he resolved issues of fact, depending on the credibility of witnesses, uniformly in favor of the

Government, without hearing the witnesses or permitting their credibility to be tested by direct and cross-examination:

that he accepted the Government's unsubstantiated gossip and rumors as sufficient to controvert sworn statements of defense witnesses who were presented as ready and able to support their affidavits in open court:

that in the face of an uncontroverted showing that evidence needed to establish the innocence of the defendant was in the possession of the FBI, or was withheld by others from the defense for fear of the FBI, he declined to permit a hearing at which the defense might be enabled to bring such evidence out into the light.

"However decorously we may phrase our criticisms of the trial court's action, they will inevitably be recognized as amounting to a charge of predetermination of the motion, without hearing of the witnesses and without that just and fair consideration which even once-convicted defendants are entitled to receive at the hands of our courts when evidence of a miscarriage of justice is offered. We cannot make any lesser charge. We believe that the trial court's handling of the motion displayed such predetermination, without fair hearing, as to amount to an abuse of its discretion, and thus to constitute error requiring reversal by this Court."

As regards judicial decorum, the proceedings in the trial court were conducted with full propriety. Nor were there explicit exclusions from consideration of matters proper for consideration, so as to bring the case within the language of such decisions as *Mattox* v. *United States*, 146 U. S. 140, 149, *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 482-3, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 247-8, *Ogden* v. *United States*, 112 F. 523, 525 (C. A. 3rd, 1902), and *United States* v. *Johnson*, 142 F. 2d 588, 591 (C. A. 7th, 1944), cert. dismissed,

323 U. S. 806.[8] But the vice at which the rule stated in these decisions is aimed is not, we submit, confined to those cases where formal ruling of exclusion appears on the record; justice requires review equally when the trial court, as here, follows the more subtle tactic of disregarding vital evidence.

We say with all earnestness in this Court that the opinion of the trial court, when read carefully against the evidence actually offered in support of our motion, stands revealed as an intricately woven tissue of excuses to justify a fixed determination—i. e., that in no circumstances must Alger Hiss be allowed a new trial—rather than a reasoned statement of the considerations leading to an exercise of true judicial discretion based on the evidence presented.

We cannot in this petition diagrammatize the improprieties of the trial court's action; we can only illustrate.

For example:

The Baltimore Documents themselves, and the envelope in which they were supposed to have been stored, were first made available to the defense for study and analysis by direction of Judge Goddard at an informal conference in his chambers on March 21, 1952.[9] The consequent study led to the tender of proof, by experts of unquestioned competence and disinterest, that the documents could not have been stored together in the envelope over the dumbwaiter: that they fell into two groups which could not have been

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[8] In the last cited case the rule was stated by Mr. Justice (then Circuit Judge) Minton as follows:

> "In determining whether or not the trial court abused its discretion, we consider not only the things which it considered as exhibited by the record in this court, but we consider also whether it improperly excluded from its consideration anything that should have been considered."

[9] See n. 6, p. 8, *supra*.

kept together under the same conditions of storage over ten years, and that both groups were totally devoid of certain stains and pressure marks which would have had to appear on documents kept in the envelope in question (R. 164a-167a).

Here, on this crucial point, the court could find no answer on the merits in the Government's opposing affidavits. But the evidence must somehow be excluded from consideration:

> "This purported new evidence of the defense regarding the condition and storage of the documents cannot be regarded as newly discovered evidence. Moreover, the documents were submitted to the jury which considered and passed upon this issue" (R. 294a).

Such a statement is absolutely incomprehensible. The judge who wrote these words was himself the same judge who, for the first time, on March 21, 1952, directed the Government to let the defense examine and test the documents. If evidence first discovered after, and as a result of, that direction is not "newly discovered", surely words have lost their meaning. And how, conceivably, can the jury be supposed to have "considered and passed upon" an issue created by evidence not known or available at the time of the trial, or presented to the jury thereat?

Again to illustrate:

The typewriter experiment is described in the Statement (*supra*, p. 7). To demonstrate its success, and consequently the fallacy underlying the Government's expert testimony regarding the typewritten documents at the trial, we filed with the trial court samples from the two machines, so that our proof would not be limited to the opinion of our expert that the typing from the two machines would be indistinguishable. Again, this proof would be embarrassing; accordingly, it is simply disregarded. The court quotes

at length a concession by the defense expert that, having been intimately concerned with the development of the experimental machine, she would still herself be able to detect a small number of distinguishing characteristics; but of the fact that she had attached to her affidavit samples from the two machines to show that other experts not so acquainted with the machine would be unable to differentiate their products, *there is not one word.* Our proof is, in the truest sense, simply excluded from consideration.

A further illustration:

Paul Willert, Vice President of the Oxford University Press in New York in 1938, was prepared to testify in support of the motion that a considerable time before March 18, 1938, he had given Chambers a translation to do, and that at the time he gave Chambers the translation Chambers was already, by his own admission, "in fear of his life as he was being hunted by the G.P.U." (R. 121a). Since eighteen of the State Department communications underlying the typed Baltimore Documents did not come into existence until after March 18, 1938, it must follow that, if Willert's recollection of the date when Chambers got the translation was correct, Chambers could not have gotten those documents from Hiss as part of his alleged espionage conspiracy when and how he said he had. And to confirm the accuracy of Willert's recollection of the date we presented copies of papers from the files of the Oxford University Press showing that at least some part of the manuscript was sent to Chambers for translation on March 18, 1938.

At the trial Chambers had testified that he got the translation from Willert only after he had broken with the Party. Our proof that Chambers got the translation well before he said he did was so compelling that the Government itself conceded on the record on the motion (R. 204a) that "Chambers erred by approximately one month"; and the trial court accepted the concession (R. 300a). Yet

our proof is disposed of by the casual answer that Chambers's testimony as to when he took the translation was "an approximation" and "a statement in reference to a collateral incident."

The sworn statement of a reputable witness, that when he gave Chambers the translation—a date which the Government and the trial court now accept as being at least as early as March 18, 1938—Chambers was already out of the Communist Party, is totally ignored.

We must on this petition content ourselves with illustrations, even though no few selected illustrations can possibly convey the full flavor of the trial court's abuse of the record. Before this Court, if the writ is granted, we shall seek to show in detail the factors which demonstrate the trial court's predetermination of the motion—its outright disregard of vital evidence in the manner described above, its distortion of evidence it did consider,[10] its denial of a hearing at which such conflicts as were posed by the affidavits could be resolved by examination and cross-examination of the witnesses.[11]

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[10] For instance, in the course of investigation into the history of the typewriter, the defense secured an affidavit from one Carlson, a vice-president of the Woodstock Company, stating certain facts regarding its date of manufacture. Further inquiry revealed that the facts stated in the affidavit were erroneous, and Carlson retracted it. The Government itself refers to the affidavit as having been later identified as "merely the speculation of some unnamed clerk" (R. 190a). But the court, without mentioning the retraction, treats the affidavit as "an affidavit for the defense", and relies on it to controvert other proof offered to support the motion in one of its most important aspects (R. 295a).

[11] *Cf. Glasser* v. *United States*, 315 U. S. 60, 87, suggesting the impropriety of declining to hear evidence offered in support of a motion for a new trial, at least in certain circumstances. *Cf.* also *Hamilton* v. *United States*, 140 F. 2d 679, 681 (C. A. D. C., 1944): "An affidavit of newly discovered evidence in a criminal case should be construed fairly to the accused. Ambiguities should not be resolved in favor of the prosecution without inquiry of the proposed witnesses."

The contrast between the attitude of the Court of Appeals in approaching an ordinary criminal case and its attitude in this case is

And we shall also seek to show the impossible, and improper, burden to which the trial court held the petitioner. Under the rule of the *Berry* case [12] it was incumbent on petitioner to tender evidence "so material that it would probably produce a different verdict, if a new trial were granted;" but this can scarcely be held to mean that the evidence must elucidate every detail of Chambers's machinations or demonstrate petitioner's innocence beyond peradventure. Under instructions which would be given by the court on a new trial a jury would have to acquit if the evidence presented raised in their minds a reasonable doubt as to petitioner's guilt. See *Coates* v. *United States*, 174 F. 2d 959, 960 (C. A. D. C., 1949).

To make this concrete: we tendered evidence that the trial exhibit Woodstock was a demonstrably fraudulent machine; and we offered evidence also as to how such a machine could have been constructed. To this the court answers that we must nevertheless fail because we cannot prove that Chambers in person constructed it and planted it on the defense (R. 296a-297a).[13] But if the trial exhibit is

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illustrated by *United States* v. *Krulewitch*, 167 F. 2d 943, 950 (1948), where the failure of the trial court to hold an evidentiary hearing on a motion for a new trial was held excusable only by the fact that the affidavit upon which the motion was based had been repudiated by the person making it, and it did "not appear that any reason was given him [the trial judge] to believe that further investigation would add evidence to support the motion."

[12] *Berry* v. *State*, 10 Ga. 511, 527. Although we shall assume for purposes of this petition that the rule of the *Berry* case governs, we reserve the right to argue, if the writ is granted, that the more lenient rule of *Larrison* v. *United States*, 24 F. 2d 82 (C. A. 7th, 1928), is more properly applicable. See *United States* v. *Johnson*, 327 U. S. 106, 111, n. 5.

[13] The court also recites "the absence of *any* proof * * * that #230,099 is not the Hiss machine" (R. 297a). So far as this is a statement of fact, it is simply not true. The discretion of a trial court to decide questions of fact on conflicting evidence cannot be enlarged into a discretion to assert that there was no evidence when there was; and a court which indulges such an impropriety demonstrates its own bias.

a fraudulently made up machine, there could be no conceivable innocent explanation for its injection into the case, and no question but that a jury must from that fact retain at least a reasonable doubt as to petitioner's guilt. This test, which we believe to be that established by authority, the trial court has completely ignored.

Of the reasoning of the Court of Appeals, which affirmed the decision of the trial court, we can say little beyond what is said above regarding the trial court's opinion; for the Court of Appeals affirmed on the opinion below, without separate opinion of its own. We may suggest that the Court of Appeals, although it did not follow the form of dismissing the appeal on its own motion, may nevertheless have thought itself to be following the substance of this Court's decision in *United States* v. *Johnson*, 327 U. S. 106, in which the courts of appeals were enjoined to decline review when "sought on the alleged ground that the trial court made erroneous findings of fact" (327 U. S. at 111). If so, we would suggest that the decision of the Court of Appeals represents a misapplication of the views of this Court; for the vice of the trial court's action lies not so much in its erroneous findings as in its failure to weigh the evidence before it fairly and without prejudgment, and its denial of opportunity to test the affidavits by oral testimony under cross-examination—in its virtual abdication of all save the form of the judicial function. We cannot suppose that the *Johnson* case was intended to bar review in such circumstances.[14]

What we have said so far has been designed to persuade the Court that the trial court so far departed from the ac-

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[14] Plainly, the decision of this Court in the *Johnson* case was in part motivated by concern lest motions for new trials and appeals from denials thereof might lend themselves "for use as a method of delaying enforcement of just sentences", and by belief that that case was a clear indication of the danger (327 U. S. at 112-113). We may point out that there is no such danger in the instant case, petitioner having already served nearly two years of his sentence.

cepted and usual course of judicial proceedings that the decision of the appellate court in sanctioning the proceedings below calls for an exercise of this Court's power of supervision. This would be so, we believe, regardless of the subject matter of the case—if it were one involving an unknown, convicted of a common crime. Yet we may beg leave to suggest that it is just because the victim is not an unknown, and because the substance of the crime charged against him was so outrageous, that the judicial process has failed to live up to its responsibilities on this motion. The Court needs no reminder that the name of Alger Hiss has become a household word, a synonym for betrayal in high office; that the story of his crime, and fear of its duplication by others, have become so inextricably woven into the fabric of our country's social and political thinking that only judicial courage and independence of the highest order would dare now to disturb it. That courage, that independence, we respectfully submit, have not been found in the action of the trial court on this motion.

Herein, in part at least, lies the special importance of review by this Court in this case. We view with profound dismay the disastrous effect which this case has had upon the morale of Government employees, upon freedom of thought for the unorthodox, indeed upon the very sanity of our body politic. No single event in the history of our country, we venture to suggest, has dealt so savage a blow to the hitherto proud and advancing cause of civil liberties. If Hiss were guilty this would be tragic enough; if, as we believe, the new trial to which we are convinced petitioner is entitled would lead to his acquittal, the tragedy, public as well as private, is shocking.

We urge the Court not to allow the disposition of this proceeding below to stand.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 629

ALGER HISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 304) [1] is reported at 201 F. 2d 372. The opinion of the District Court (R. 286-303) upon which the Court of Appeals affirmed is reported at 107 F. Supp. 128.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1953 (R. 305). The petition

[1] The Record filed with the petition for certiorari herein is designated as R. References to the Record filed with this Court during October Term, 1950, in conjunction with the petition for a writ of certiorari to review the judgment of conviction (No. 520) are designated as Tr. R.

for a writ of certiorari was filed on February 28, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the trial court abused its discretion in dismissing petitioner's motion for a new trial on the ground of newly discovered evidence after oral argument and consideration of affidavits submitted in support and in opposition thereto, but without hearing testimony.

RULE INVOLVED

Rule 33, F. R. Crim. P. provides in pertinent part:

> The court may grant a new trial to a defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment. * * *.

STATEMENT

Petitioner seeks review of the judgment of the court below, which affirmed *per curiam*, on the opinion of the District Court for the Southern District of New York, filed on July 22, 1952, an order denying petitioner's motion (R. 4-169) under Rule 33, F. R. Crim. P., for a new trial on the ground of newly discovered evidence.[2]

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[2] No separate order was entered because pursuant to Rule 10 of the General Rules for the District Court for the Southern District of New York, effective March 10, 1952, the opinion of the court, filed on July 22, 1952, constituted the order of the court.

In January, 1950, petitioner was convicted of perjury under an indictment in two counts charging that, before a grand jury in the Southern District of New York, petitioner had falsely testified (1) that neither he, nor his wife in his presence, had ever delivered any documents of the State Department to Whittaker Chambers and (2) that he had never seen Whittaker Chambers after January 1, 1937. See *United States* v. *Hiss,* 185 F. 2d 822 (C.A. 2), certiorari denied, 340 U.S. 948.

At the trial,[3] Chambers, the principal prosecution witness, testified that while he was a "liason man" between the American and Soviet segments of the "underground apparatus in Washington," petitioner was transferred to his organization, and that out of their cooperation in espionage activities there had developed a close friendship among them and their wives (Tr. R. 223-238, 240-264).[4] Shortly after petitioner was employed by the State Department in January 1937, he began supplying Chambers with official State Department documents (Tr. R. 253, 254-256, 257). From that time "until the middle of 1937", petitioner every week

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[3] The court's attention is called to the Government's Brief in Opposition (3-13) to petitioner's application for certiorari to review the judgment of conviction, *Alger Hiss* v. *United States of America*, No. 520, October Term, 1950, which contains a concise but comprehensive summary of the evidence.

[4] Chambers testified that from 1934 to 1938 the Chambers frequently visited the Hisses and, on occasion, lived in the latter's various Washington residences (Tr. R. 242, 243, 248, 250, 252), and the Hisses likewise visited the Chambers in the latter's residences in Baltimore and elsewhere (Tr. R. 243-245, 248, 250, 251, 262, 264, 277-279). This was corroborated by testimony of Mrs. Chambers (Tr. R. 954-1071).

or ten days took selected State Department papers to his house, where Chambers would pick them up the same day, take them to Baltimore to be photographed, and return them the same night to petitioner (Tr. R. 257-259, 277). Thereafter, in order to speed up the flow of documents, petitioner brought to his house almost nightly some State Department papers, copies of which were typed verbatim or paraphrased,[5] and every week or ten days such copies, plus the original documents brought from the office that day, would be picked up by Chambers. The latter, after photographing them, would return the original documents to petitioner, burn the typed documents, and transmit the film to the "apparatus" (Tr. R. 258-259). In addition to such documents, petitioner at times also gave Chambers "small handwritten notes" about information contained in State Department documents, and Chambers transmitted photographs of these notes to the "apparatus" (Tr. R. 259).

About the early fall of 1937, Chambers began contemplating his disassociation from the Communist Party (Tr. R. 260). He continued to receive documents from petitioner until he broke with the Party around April 15, 1938, and moved to another residence in Baltimore (Old Court Road). He remained there until he obtained certain work as a translator for the Oxford University Press in

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[5] Chambers understood that the typing entailed in copying the documents would be done by petitioner's wife, who thereby would satisfy a desire to perform "some activity for herself" in the "underground work" (Tr. R. 290, 259). However, he never saw her type any of the documents (Tr. R. 580).

New York (Tr. R. 259-261, 264-265). However, he "saved" some of the typed copies of documents, handwritten notes, and film which he had received from petitioner just before his break with the Party, and delivered them in a sealed envelope to his wife's nephew, one Levine, in New York (Tr. R. 260; see also Tr. R. 728). Levine placed the envelope in an unused dumbwaiter, where it remained until late 1948, when Chambers took its contents for use in a libel suit instituted against him by petitioner (Tr. R. 290-292; see also Tr. R. 727-729).

Chambers' foregoing testimony was corroborated principally by the contents of the envelope kept by Levine which were admitted in evidence. The Government's "Baltimore" [6] Exhibits 1-4 (Tr. R. 299, 3433-3440) were four handwritten memoranda, which petitioner conceded at the trial were in his handwriting (Tr. R. 1073; see also Tr. R. 53, 1833). They consisted of summaries of the contents of four cablegrams which came to the State Department in January and March 1938.[7]

The Government's "Baltimore" Exhibits 5-9 and 11-47 (Tr. R. 299, 3441-3444, 3447-3520) consisted of 43 typewritten pages of copied, extracted or condensed material from official State Depart-

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[6] So called because they were originally received in evidence in connection with the libel suit instituted by petitioner against Chambers in the United States District Court for the District of Maryland, at Baltimore, in September 1948 (see Tr. R. 298, 290-293, 2448).

[7] The Government's "State" Exhibits 1-4 (Tr. R. 761-764, 3535-3542) were the "underlying" State Department documents, i.e., the four cablegrams themselves.

ment documents.[8] Through its expert, Feehan, the Government established that all of the typewritten "Baltimore" exhibits were the products of some Woodstock typewriter, which was also used for typing certain standards admittedly typed on a typewriter owned by the Hisses ("Hiss Standards") (Tr. R. 1074-1075, 1106; Gov. Exs. 34, 37, 39, 46; Tr. R. 700, 705, 707, 742, 3345-3346, 3351, 3355-3356, 3373-3374).[9]

As part of his defense, petitioner introduced into evidence a Woodstock typewriter serial No. N230,-099 (Def. Ex. UUU; Tr. R. 1559, 3799), identified as one which had been given to Mrs. Hiss by her father around 1933, and which she had given to one of her maid's children around December, 1937 (Tr. R. 1914-1915, 1917, 1978-1979, 2282, 2344-2347, 2349, 2350-2351, 2324, 1850, 1885, 1717-1720, 1584-1600, 1556-1559).[10]

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[8] The Government's "State" Exhibits 5-9 and 11-47 (Tr. R. 765, 767, 790-824, 3543-3546, 3549-3630) were the "underlying" State Department documents, which bore dates indicating that they were received or prepared in the State Department between January 5 and April 1, 1938. There was evidence that Hiss had access to these documents in the State Department (Tr. R. 765, 767, 790-824).

[9] Feehan's conclusion was based on his study of all characteristics of the documents involved (Tr. R. 1080-1081). However, he demonstrated to the jury only "some" identical characteristics found in both the Baltimore documents and the Hiss standards upon which he based his conclusion that both sets of documents were the products of the same typewriter (Tr. R. 1075-1081).

[10] Petitioner's wife also testified that she had typed on the Woodstock machine all four of the "Hiss Standards" (Tr. R. 2343, 2347). And both the defense and the Government accepted the typewriter in evidence as the one which also produced the "Baltimore" documents (Tr. R. 195, 201, 3144, 3162, 3253).

In rebuttal of testimony of petitioner and his wife (Tr. R. 1853, 2039, 2381) that they had never visited the Chambers in Baltimore or anywhere else, Edith Murray, a former maid of the Chambers, testified for the Government that she had seen both petitioner and his wife at Baltimore residences of the Chambers on several occasions in 1935 or 1936 (Tr. R. 3024-3027, 3032).

Petitioner's motion for a new trial and supporting affidavits alleged that newly discovered evidence tended to prove (1) that a typewriter with characteristics similar to those by which the Baltimore documents were identified as having been made on the Hiss typewriter could have been fabricated; (2) that the typewriter which petitioner introduced as the one at his home in 1937, and which was accepted by the government as the source of the "Hiss standards" and the Baltimore documents, was not in fact the Hiss typewriter; (3) that Chambers had left the Communist Party before the date of the last of the Baltimore papers and could not have received them, and (4) that Edith Murray had not been employed by the Chambers at the places mentioned in her testimony (R. 3-169).

The newly discovered evidence offered by petitioner and the Government's counter-affidavits with respect thereto may be summarized as follows:

1. *Possibility of the Fabrication of a Typewriter:*—Martin Tytell, an expert experienced "in the creation of unique typewriters for foreign language and other purposes", was asked to create, from samples of typewriting, a new machine which

would duplicate in type defects, alignment, and all other respects that a document expert would consider pertinent, the machine from which the samples were taken. After experimenting for a year and a half or two years, during which the results were checked by comparison of samples by a document expert, he produced a machine which the document expert found still lacked "the highest degree of accuracy" (R. 18-20, 54-55, 56-59). The document expert testified that she could "distinguish between the products of the two machines", but that, in her opinion, any document expert not suspecting "that a deliberate attempt at duplication of machines had been made, would be deceived into thinking that all the samples were made on a single machine" (R. 58-59, 148-149).[11]

However, Evelyn Ehrlich, an expert in "the detection of spurious prints", in the course of her examination, at petitioner's request, of two different groups of unmarked samples from both the typewriter fabricated by Tytell and the Woodstock admitted in evidence (serial #N230,099), "successfully differentiated the typing of the two machines" (R. 60-62, 155). As a result of another experiment, she formed the "opinion" that any reasonably careful document expert, applying the criteria used by Feehan "in demonstrating to the jury his conclusion that the Baltimore documents and the Hiss standards had been typed on the same machine",

[11] She admitted, however, that she had "no way of knowing how far" the experts might also be successful in making the same distinction as she had done between the products of the two machines (R. 148).

would conclude "that a single machine had been used to type all" the samples used in her test, because the two machines contained "many more similar deviations than the ten which Mr. Feehan described to justify his testimony at the trial" (R. 62-64, 156).

The government pointed out that petitioner's not wholly successful experiment provided no explanation of how Chambers could have obtained samples of typing or could have had the opportunity or time to engage in the long experimentation described by petitioner. Also, the Government offered the affidavit of Feehan, who explained that, in being asked at the trial to demonstrate "some" of the characteristics used as a basis for his conclusion that the Baltimore documents and the Hiss standards were the products of the same typewriter, he selected ten letters which appeared "many times" in those documents. Feehan stated that his laboratory examination and the resulting conclusion were based upon the test he made in the F.B.I. laboratory, where he "examined and compared each typewritten character appearing on the Baltimore documents #5 through #9 and #11 through #47 with the known standards, taking into consideration style of type, alignment, horizontal and vertical spacing, footing, variations and defects", and found "no unexplainable differences existing in the typewritten characters on the questioned and known documents, nor * * * any evidence that more than one typewriter was used". (R. 210-211.)

2. *The Fabrication of the Typewriter Offered in Evidence:—*

The typewriter on which the "Hiss standards" were admittedly written had been given to Mrs. Hiss by her father. An expert, who examined the correspondence of the father's firm, concluded that by July 8, 1929, that firm had acquired a Woodstock similar in typeface pattern to the Hiss typewriter (R. 81-83).[12]

a. Petitioner sought to establish that Woodstock No. 230,099 (the number of the machine in evidence) was not manufactured till some later date. He succeeded in obtaining from two officials of R. C. Allen Business Machines, Inc., a successor to the Woodstock Typewriter Company, conflicting statements concerning the possible dates of the manufacture of Woodstock No. 230,099. A vice-president of the company stated in an affidavit (R. 68), which he later retracted (Pet. p. 16, fn. 10), that from the records which the company had, "typewriter No. 222,402 was built in March or April, 1929 and serial No. 230,000 was built in April or May 1929" (R. 68). The company's factory manager, Schmitt, indicated that Woodstock No. 230,099 "was built approximately in July or

[12] Since that expert had only photostats of photostats of the "Hiss standards", he would not express a positive opinion that they were written on the same typewriter. He did say that a comparison of the individual typeface characteristics in the Northwestern Life Insurance typewritings dated July 8, 1929, and after, with the Baltimore Letters and Standard Hiss specimens, showed a tendency in the 1929-1930 Northwestern Life Insurance specimens toward the development of typeface defects that later became so highly identifying in the 1933 and 1935 specimens and the Baltimore Letters (R. 84-90).

August 1929", but refused to verify his statement under oath (R. 69-72). Petitioner's attorney, using certain production statistics and approximate dates of the assignment of certain serial numbers to manufactured typewriters, obtained from the manufacturer's records, made a computation, on an average basis, from which he concluded that at best Woodstock No. 230,099 could not have been manufactured before July 3, 1929 (R. 73-74).

The government's opposing affidavit pointed out that the figures submitted by petitioner reveal "how totally incomplete and unreliable they are as the bases of further conclusions", over 13,000 serial numbers having been skipped in that one year with no apparent reason (R. 190). On petitioner's own view of the figures, No. 230,099 could have been produced in June, 1929 (*ibid.*)

b. Petitioner also employed an industrial chemist, Norman, to make a comparison of No. 230,099 with other Woodstock machines manufactured prior and subsequent thereto. He found that No. 230,099 differed from comparison machines in that (1) the solder holding the type to the typebars contained more nickel and had not been filed flat; (2) the types were not all made from the same batch of metal and (3) there were three "abnormal tool marks", "outstandingly so on the small letter 't' ", indicating mechanical alterations. On the basis of these observations, Norman concluded that the soldering of the type to the typebars on Woodstock No. 230,099 was not made at the Woodstock factory or by a professional repairman and that

the typewriter was not one "which has worn normally since leaving the factory, but shows positive signs of having been deliberately altered, in that many of its types are replacements of the originals and have been deliberately shaped" (R. 123-133).

On the other hand, both Otto Hokanson, a superintendant of the Woodstock Typewriter Company plant at Woodstock, Illinois, from 1925 until the middle of 1929, and Conrad Youngberg, who followed him as superintendent [13] from 1929 to 1933, stated in their affidavits that the process of soldering was such that there was "considerable variation in the amount of solder left on the ends of the bars"; that no nickel was intentionally used in solder although the typebar was nickel plated at the end of the operation (R. 226-229). Thus, as the government pointed out, variations in the amount of nickel would result from the amount of nickel plate taken off with the underlying solder and, if there were alterations, less nickel would be found since it was unlikely that the altered typebar would be nickel plated anew (R. 193). The superintendents' affidavits also stated that the stockpile of type from which type was drawn for soldering to the bars varied monthly and therefore the type used on a particular machine "could have been made from two different batches of steel"; that no change in dies for the letter "t" had been made at

[13] Youngberg, who was previously Assistant Superintendent at Woodstock "designed and set into operation the process for soldering type to type-bars, which process was in operation in 1929" (R. 226).

the plant in 1929; that the samples of letter "t" used by Norman in his comparison of other Woodstock models with No. 230,099 were not products of Woodstock; that it would have been extremely difficult to change the curvature of the letter "t" without the type face bearing marked evidence of alteration by mechanical means"; and finally that the appearance of the type did not indicate any alteration thereof other than that caused by "mere abnormal use of the typewriter" (R. 227-229).

3. *The falsification of the Baltimore documents:*

a. Norman, after examination of the paper of the Baltimore documents, noted that of the two sizes used the larger sheets were more heavily yellowed than the smaller, although of the same general class of paper, and concluded that "they could not have been stored together under the same atmospheric conditions for most of their existence." (R. 164-166).[14]

The government expert pointed out that the effects of age in the "Baltimore" papers [15] could not be expected to be uniform across their surfaces because they "were obviously folded in fourths for a

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[14] Norman also noted that the "Baltimore" documents showed no stains or pressure marks which would have inevitably resulted if they had been enclosed in an envelope for a period of 10 years (R. 166-167).

[15] An analysis of white paint splatterings from the dumbwaiter shaft in Levine's house with those appearing on the envelope in which the documents were enclosed showed them "to be of the same color, texture and composition" (R. 222, 220).

considerable period of time," [16] and that "the inference that papers of the same general class will show the same aging characteristics is without foundation" because aging characteristics differ with "variations in such constituents as rosin (sizing material), iron, lignin and bleaching" (R. 217-218). The government also pointed out that there was no proof of the age of each type of paper when typed (R. 191-192).

b. Norman also concluded that there was an alternation in the use of several typewriter ribbons in typing the Baltimore documents because, "in a number of instances two documents dated some time apart are typed with a ribbon of a given thread count while other documents with dates in between are typed with a ribbon of a different count" (R. 168).

The government pointed out that there was no claim that the Baltimore papers were typed in the same time order as the dates of the documents (R. 193). Its expert stated that, even assuming that "it were possible to make an accurate thread count of each and every letter of the Baltimore Documents, a difference in thread count would not justify a statement that" several ribbons were used in typing those documents, because even according to federal specifications "it is permissible for grade A cotton ribbons to have a variation of five threads per inch in either the vertical or horizontal threads" (R. 219-220).

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[16] The aging characteristics were so obvious as to permit the arranging and folding in the manner in which they were stored (R. 217).

c. Petitioner's expert, McCarthy, who participated in the typewriter fabrication experiment, concluded that the Baltimore documents were not the work of one typist, that petitioner's wife did not type them (R. 151-152), and that the pencil corrections appeared to have been made at one time (R. 153-154).

The government expert noted that it was almost impossible to identify an "inexperienced typist who is copying documents and obviously influenced by the form of the source material" (R. 213), and that the writing characteristics evidenced by the few brief pencil markings are insufficient for accurate or valuable conclusions (R. 214-215). The government also pointed out that, while Chambers testified that he understood that petitioner's wife typed the documents, he also stated that he had not seen the typist (R. 185, see Tr. R. 580).

4. *Chambers' breach with the Communist Party:* —Petitioner, interpreting Chambers' testimony to be that the latter's breach with the Party was contingent upon his receipt of certain translation work, produced evidence tending to show that Chambers actually obtained such work from the Oxford University Press before March 18, 1938 (R. 119-121). There was also produced a letter from Chambers to the publisher dated May 3, 1938, in which he explained the non-receipt of communications dated April 12 and 18 (R. 100-102) by saying that he had not been at his Mt. Royal Terrace apartment [in Baltimore] for more than a month

(R. 104). Petitioner concluded that the Chambers break from the party must have come by March 18, and that he therefore could not have received from petitioner the later-dated documents, the last of which is dated April 1, 1938 (R. 41-48, 108-110).

The government pointed out that an error by Chambers as to the date when he received translation work would not necessarily prove an error as to the date when he broke with the Communist Party and left his Mount Royal Terrace apartment (R. 204-205). An affidavit from an official of a utilities company showed that the Chambers had paid for their gas and electric service at the Mount Royal Terrace address until April 9, 1938, and that, on April 12, 1938, Mrs. Chambers ordered the furnishing of gas and electric service for a room in a house on Old Court Road, Baltimore, after prior tenants of that room had discontinued such service on April 4, 1938 (R. 236-238).[17]

5. *The Testimony of Edith Murray:*—In support of petitioner's claim that Edith Murray had never seen him in any of the Chambers' Baltimore residences during 1935 and 1936 (see *supra*, p. 7), petitioner submitted two affidavits of persons who stated that they had never seen a colored maid in the employ of the Chambers (R. 90-95).

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[17] On April 1, 1938, Mrs. Chambers took the family car for some servicing, the nature of which would indicate that a trip was contemplated (R. 240-241). On April 2, 1938, from the Mount Royal residence, she addressed a letter concerning her child, to a local school (R. 242-243). A week later, she addressed another letter to the school from Lynbrook, New York, stating that she would call at the school in a few days (R. 244).

William Fowler, while cautioning that he did not "remember names very well," stated that "three to five times a week," during the period 1934-1935, he and his wife were guests of the latter's aunt, a housekeeper, at the address on St. Paul Street, Baltimore, where the Chambers were supposed to have lived in 1935, but he did not remember anyone by the name of Chambers or Cantwell (Chambers' alias) living there (R. 91-92). Moreover, he was "absolutely positive" that no maid had ever been employed by any tenants there during that period (R. 93).

To the contrary, Fowler's estranged wife stated that "until approximately eight months" after their marriage, she and Fowler visited at the St. Paul Street residence "not more than once every three weeks," and she recalled that on one such visit she heard her aunt state "that a family named Cantwell had resided" there (R. 233-234).

Louis Leisman stated that from September 1935 to December 1936, he had been custodian of the building adjoining the residence on Eutaw Place, Baltimore, where the Chambers lived from October 2, 1935 to June 27, 1938 (R. 234-235), that, although he had spent much of his time "on the front steps" of his building, he never knew the Chambers to have a maid (R. 94). He added that the neighborhood consisted of a "very low type white people," that because it would have been an uncommon situation, he would have inevitably heard some comment if any neighbors had employed a maid, and that because of the unsavory

reputation in the neighborhood he would have made some inquiry if he had noticed a colored girl entering the premises (R. 95).

The United States Attorney stated in his affidavit that, the Government had been advised by "three independent and reliable witnesses" that in fact Mr. Leisman was not employed at the Eutaw Place house at the period in question; that he had been employed there in the early part of 1935 but had been fired for drinking (R. 202).

The District Court, after a full consideration of the affidavits submitted in support of petitioner's motion, following oral argument on both sides, but without personally hearing the affiants of the supporting affidavits, found that, "There is no newly discovered evidence which would justify the conclusion that if it were presented to a jury, it would probably result in a verdict of acquittal" (R. 286-303).

ARGUMENT

A mere reading of the careful opinion of the district court, on which the Court of Appeals was content to rely, is a sufficient refutation of petitioner's argument that the district court abused its discretion and applied improper standards in denying his motion for a new trial. Petitioner's affidavits, to the extent that they are not based on pure speculation, are so inherently weak and so thoroughly refuted by the Government, that it was entirely proper to deny the motion on affidavits alone.[18] *United States* v. *Johnson*, 327 U.S. 106, 109; *Harri-*

[18] It should be noted that the alleged newly discovered evidence, upon which petitioner's motion for a new trial was predi-

son v. *United States*, 191 F. 2d 874 (C.A. 5); *United States* v. *Forzano*, 190 F. 2d 687 (C.A. 2); *United States* v. *Cordo*, 186 F. 2d 144 (C.A. 2), certiorari denied, 340 U.S. 952.

1. *Fabrication of the Typewriter by Chambers.*—The district court properly concluded that petitioner's supposition "that Chambers constructed the alleged duplicate typewriter from the typewritten characters in the Hiss letters, or that it was done for him by some Communist friends," is based solely upon "conjecture with absolutely no evidence to support it" (R. 296). Not only was the year and a half experiment on petitioner's behalf not wholly successful, but there was absolutely no evidence that Chambers had specimens to work from, or that he had the personal ability to construct such a typewriter or sufficient time in which to do so, or that he had the assistance of experts

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cated, related specifically to Chambers' direct testimony in support of the perjury charge in count one of the indictment and, particularly, to the documentary evidence corroborative of such testimony, other than the handwritten notes as to which no new evidence was offered (see opinion at R. 297). The proof upon which petitioner's conviction under count two was based was not dependent upon the same evidence but, instead, consisted of Chambers' other testimony, which was substantially corroborated by his wife's testimony (Tr. R. 954-1071) to the extent that it related to the friendly and social relationship which had existed between the Chambers and the Hisses between 1937 and 1938. Therefore, as petitioner expressly recognizes (Pet. p. 4, fn. 2; p. 6, fn. 5), his motion, and the petition herein have been necessarily limited to the charge contained in count one of the indictment. Petitioner endeavors to extend the scope of the motion by stating that it was "in effect conceded by the Government and by the courts below that if evidence warranting a new trial under Count I were produced the conviction under Count II could not stand" Pet. p. 4, fn. 2; p. 6, fn. 5). Neither the Government nor the courts below have made such a concession.

to create it, or that he had the knowledge which would enable him to plant it where petitioner would find it (see opinion at R. 296-297).

As the district court also pointed out (R. 297) "The defense reasoning that #230,099 was manufactured after the Hiss machine is not sustained by any proof. Their theory is based wholly upon incomplete records from which they have drawn speculations from approximate dates of manufacture."

The bases of the opinion as to fabrication by petitioner's expert, Norman, were completely demolished by the affidavits of the superintendents of the Woodstock plant (see Statement, *supra*, pp. 10-13). The district court was clearly correct in holding that "In the absence of any proof and in view of the many improbabilities in the theory of the defense, a jury could not reasonably find that Chambers constructed a duplicate typewriter or that #230,099 is not the Hiss machine" (R. 297).

2. *Falsification of the "Baltimore" documents.*—The Government rested its case upon the evidence that the "Baltimore" documents and the Hiss standards were typed on a single typewriter, without identifying the machine. Thus, in order to have any value, petitioner's evidence had to show that the Baltimore documents were forged, even if he could show that No. 230,099 was not his machine. Petitioner has offered no evidence showing that the "Baltimore" documents and the Hiss standards were not the products of one machine. His experts admittedly could not distinguish between these two sets of documents, although they were able to dis-

tinguish between products of No. 230,099 and the experimental machine. His expert, McCarthy, though willing to believe that a forgery has taken place, admits that she cannot detect it. (R. 58, 60-62, 155, 84-90, 157-161.)

With respect to the evidence of the identity of the typist of the "Baltimore" documents, it is not only inconclusive, but totally irrelevant. The Government's case in no way turned upon such identity, for, although Chambers testified that petitioner told him his wife would be the typist, he also testified that he did not recollect seeing anyone type the documents (see Statement, *supra*, p. 4, fn. 5).

The purported new evidence concerning the condition and storage of the documents was, as the district court count pointed out, evidence which could have been available at the trial (R. 294) and was in any event, completely refuted by the Government (see Statement, *supra*, pp. 13-14, and opinion at R. 293).

3. *Chambers' breach with the Communist Party:* —Chambers did not fix the time of his withdrawal from the Party as contemporaneous with the time of his receipt of translation work. He fixed the time of the break as the time of his removal from Mt. Royal Terrace to Old Court Road, and his receipt of the translation work as the time of his departure from Old Court Road (Tr. R. 259-265). Hence, as the district court pointed out (R. 300-301) if he erred as to the time of the translation work, the error goes merely to a collateral issue and does not prove that Chambers had left the party before April 1. The utility records offered by the government (see Statement, *supra*, p. 16)

show that Old Court Road had been occupied by another tenant until April 4, 1938, and that Chambers had not ordered the utilities connected until April 12, 1938.

4. *Rebuttal witness:*—As to petitioner's attempt to discredit the testimony of Edith Murray, Chambers' maid, the District Court stated that "This evidence is neither convincing nor conclusive for the opportunities of Fowler and Leisman to observe Murray were limited", and that "there is no indication that the defendant or his lawyers made any effort to elicit this information and offer it at the trial—no request for an adjournment or continuance was requested at the time—and the facts do not justify the inference that this information was sought with due diligence" (R. 299). Moreover, the Government presented facts seriously impeaching the credibility of both (see Statement, *supra*, pp. 17-18).

CONCLUSION

The judgment below is correct, and the petition for certiorari presents no question warranting further review by this Court. It is therefore respectfully submitted that the petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 629

ALGER HISS,

Petitioner,

against

UNITED STATES OF AMERICA.

REPLY BRIEF OF PETITIONER

CHESTER T. LANE,
ROBERT M. BENJAMIN,
WALTER E. BEER, JR.,
HELEN L. BUTTENWIESER,
Counsel for Petitioner.

April, 1953.

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REPLY BRIEF OF PETITIONER

Ordinarily we should hesitate to burden the Court with even a short reply brief on a petition for certiorari—particularly a reply brief dealing principally with disputes of fact. But we know that through long experience the Court has come to rely on the Government for high standards of fairness, accuracy, and completeness in the statement of the pertinent facts, and we fear that failure to reply would be taken as acquiescence in the assumption that those standards have been adhered to in this case. They have not. The Government's plausible statement in its brief in opposition contains so many plain errors and misleading inferences or omissions that it wholly distorts the presentation of which petitioner has been trying, unsuccessfully, to secure judicial consideration.

As in our petition for a writ, we cannot undertake to detail the inaccuracies in the Government's brief. We can only illustrate.

1. For instance, the Government does not question the importance of proof—if there be such—that Woodstock No. 230,099 was not manufactured at least until July, 1929.

But the Government depreciates the proof offered, by referring to "conflicting statements" of Woodstock officials, by categorizing the computations of petitioner's attorney as having been made "on an average basis"—as if somehow that made them seem unreliable—and by stating that: "On petitioner's own view of the figures, No. 230,099 could have been produced in June, 1929" (Br. 10-11).

The only conflict between Woodstock officials was between an affidavit of one Carlson, and the actual Woodstock records which Carlson later joined with Schmitt in producing for inspection. When he examined the records, Carlson repudiated his affidavit, saying that it had been prepared for him by an unnamed clerk. Once the records were produced there was no conflict as to their meaning.[1]

As to petitioner's attorney's computations having been made "on an average basis", the statement is completely unfounded in so far as it relates to the demonstration that No. 230,099 could not have been made before the first week in July, 1929. The records showed the serial numbers at the beginning and end of the year, and the exact number of machines produced each month. From this the earliest month in which a machine could have been produced can be determined with mathematical certainty. That month was July.[2]

Finally, the Government would damn petitioner's evidence by the statement that "on petitioner's own view of the

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[1] The Government does concede (Br. 10) that the affidavit was "later retracted", but it leaves the implication that there still remained a conflict. The trial judge did not even note the retraction; he relied indefensibly on the affidavit as controverting petitioner's proof.

[2] Some serial numbers were skipped, as the Government points out (Br. 11); but the determination that July was the earliest possible month was based on an assumption that all the skipping was done at the time most detrimental to petitioner's position. Lacking that assumption the machine would have had to be made even later (see R. 74a).

figures, No. 230,099 could have been produced in June, 1929". This statement is wholly unfounded. The supporting citation is to a similar statement in the trial court by the United States Attorney, who in turn referred to paragraph 6 of petitioner's attorney's memorandum of computations (Ex. IID, R. 74a). The United States Attorney simply misread the paragraph to which he referred, and his error is copied uncritically by the Government in this Court.

2. As regards the evidence inherent in the Baltimore Documents themselves that they are forgeries, the Government's most telling argument (Br. 21) is that this evidence "could have been available at the trial". Here again, the statement is wholly unsupported by anything in the record except the trial judge's similar unwarranted statement in his opinion (R. 294a). Attempts to secure access to the Baltimore Documents for physical analysis were continually frustrated by Government opposition before, during, and after the trial, and succeeded at last only on March 21, 1952 (see R. 117a-119a, 137a-139a, Pet. 13-14).

3. Of the Government's studied omission of any reference to such matters as the typing specimens submitted to the trial court in proof that a machine can be fabricated, and to the testimony of Paul Willert that when Chambers got the translation he was already out of the Party, we need say no more than was said in our petition with respect to similar omissions in the trial judge's opinion (Pet. 14-16).[3]

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[3] A point is made by the Government (Br. 18, n. 18) that the evidence on this motion affects only Count I of the indictment, and that the Government does not concede that if a new trial were granted on Count I, the conviction on Count II could not stand. We stated in our petition (Pet. 4, n. 2; 6, n. 5) that this had been "in effect conceded by the Government and by the courts below"; we based this statement on the fact that though the United States Attorney made the point about Count II in the trial court, the trial judge rejected it *sub silentio* and it was not renewed in the Govern-

These are among the more palpable inadequacies in the Government's presentation of the case to this Court. On a hearing on the merits we should develop innumerable others. In citing these few in support of our petition we are not undertaking a premature battle on the merits; we are simply seeking to emphasize the atmosphere of prejudgment and lack of fair presentation and consideration which has so far enveloped our efforts to bring out the truth in this case. Again we urge the need of review by this Court to ensure that the judicial process shall live up to its responsibilities in a case which so deeply affects our national morale.

Respectfully submitted,

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April, 1953.

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ment's brief on appeal. Regardless of concessions, it seems clear that Count II could not stand; for the trial court charged the jury that if they found Hiss guilty on Count I they should also find him guilty on Count II (Tr. R. 3275), and it must therefore be assumed that the jury did not necessarily consider any of the separate evidence under Count II. See *Stromberg* v. *California*, 283 U. S. 359. Less technically, it may be suggested that if the jury found that Chambers had forged the Baltimore Documents, the possibility of their nevertheless convicting Hiss on the ground of his having seen the Chamberses on one or two social occasions after January 1, 1937, is so remote that it could scarcely be seriously considered.